No. 18762

In the United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

CITY OF TACOMA, WASHINGTON
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE CITY OF TACOMA, APPELLEE

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RESTATEMENT OF THE CASE

The statement of Appellant omits several important matters. Appellant's original Complaint filed April 18, 1961, and Amended Complaint filed October 25, 1961, to which the Notice of Taking refers, clearly state the proposed use for which the property is to be taken as follows:

> "3. The use for which the property is to be taken is for the public use for the construction, operation and maintenance of a flood control proj-

ect and for other uses incident thereto." (R. 2, 44)

The Declaration of Taking by the Secretary of the Army, Elvis J. Stahr, Jr., on April 3, 1961, declares in Paragraph 1 (a) that the legislative authority for the taking are various acts of Congress

> "which authorize the acquisition of land for flood control projects; . . . the project for the Eagle Gorge Reservoir, on the Green River, Washington; . . . the dam to be constructed as the Howard A. Hanson Dam; and the Act of Congress approved September 2, 1958 (Public Law 85-863), which act appropriated funds for such purposes."

The Secretary of the Army further declares in Paragraph 1 (b):

> "The public uses for which said land is taken are as follows: The said land is necessary adequately to provide for the construction of a flood control project and for other uses incident thereto. The said land has been selected by me for acquisition by the United States for use in connection with the Howard A. Hanson Dam and the Eagle Gorge Reservoir, on the Green River, in King County, State of Washington, and for such other uses as may be authorized by Congress or by Executive Order." (R. 15)

The Secretary of the Army further declares in Paragraph 3:

> "The estate taken for *said* public uses is perpetual and assignable easements and rights of way to locate, construct, operate, maintain, and repair a roadway . . . " (R. 16) (Emphasis ours.)

Paragraph 4 of the original and amended Complaint, however, states in part:

> "4. The interest in the property to be acquired is a perpetual and assignable easement and right of way to locate, construct, operate, maintain and repair a roadway . . . " (R. 2, 44)

The contention of the Appellee, City of Tacoma, reflected in the final Judgment (R. 80) to the effect that the estate taken was for a private roadway only, was based on these declarations of purpose and the official government departmental reports establishing and limiting the project as a flood control project and recognizing the City's interest in protecting its municipal water supply from pollution since the project was being built in its watershed.

The government reports are perpetuated in the House of Representatives Document No. 271 of the 81st Congress (Ex. A). This document, for example, sets forth in Paragraph 76 on Page 41 the following statement by Col. Hewitt, the Corps of Engineers District Engineer:

> "76. *Recreational Development of the Reservoir Area.* No plans for recreational development of the reservoir area are presented. The reservoir lies entirely within the watershed area of the Tacoma municipal water-supply system and it is certain that the city would protest any development that might lead to contamination of the water supply. Furthermore, the Puget Sound region is well supplied with numerous freshwater lakes that have permanent pools and that are much more readily accessible to the metropolitan area than would be the Eagle Gorge Res-

ervoir, and it appears, therefore, that recreational facilities at the reservoir are not needed."

When at a later time, but prior to the entry of Judgment, it was discovered that the limitations of the use of this property were not clearly understood by the United States Attorney and certain agencies of the Federal Government who purportedly considered this road to be usable for purposes other than those incident to a flood control project, the City submitted on May 13, 1962, nineteen interrogatories to the United States specifically designed to clarify the extent of the proposed use. These read as follows:

" 1. Is the United States Government condemning the property involved in the above-entitled action for the use of the United States Government in its development of the Howard A. Hanson Dam and the Eagle Gorge Reservoir?

2. Will the land that is taken in the above entitled proceeding be used for purposes other than for the maintenance, operation and control of the Howard A. Hanson Dam and Eagle Gorge Reservoir?

3. If the answer to Question No. 2 is "Yes", please explain.

4. Is the United States Government condemning the right of way involved in the above-entitled case for the use of the Corps of Army Engineers, or for the United States Forest Service, or some other Federal agency?

5. What Federal agency or branch of the United States Government will control or maintain the right of way over the 29.98 acres of land which is under condemnation in Cause No. 5256?

6. If that agency is the United States Forest

Service, what use will they make of that land?

7. Explain the multiple use concept of the United States Forest Service.

8. Will the road right of way and land which is taken in Cause No. 5256 be used for the multiple use purposes of the United States Forest Service?

9. Will this land be opened to public access?

10. Will this land and the road located thereon be used for recreational purposes?

11. Will the United States Government restrict the use of this road and the area surrounding in such a manner as to protect the City of Tacoma's Watershed from use by the general public for recreational purposes?

12. Will the United States Government restrict the use of the road involved in this condemnation and the area around it in such a manner as to protect the City of Tacoma's Watershed from through traffic by the general public?

13. Is the United States Forest Service a department or branch of the United States Department of Agriculture?

14. Will the United States Government or the United States Forest Service use the road and property here under condemnation in such a manner as to be consistent with the terms of an agreement and contract entered into between the United States Department of Agriculture and the City of Tacoma on March 27, 1914, a copy of which is attached hereto and marked as Exhibit "A", and which agreement provided for the protection of the City of Tacoma's water supply and limited the use of roads in the Snoqualmie National Forest?

15. Will the road and right of way located on

the 29.98 acres of land be used for purposes other than that of marketing, cutting and disposing of timber, as provided in Exhibit "A" attached hereto?

16. If the answer to Interrogatory No. 15 is "Yes", explain what use will be made.

17. Will individuals owning private property or campsites in the area known as the City of Tacoma's Green River Watershed be permitted to use the road located in the above-entitled condemnation for access to the campsites and property?

18. After the condemnation of the easement for road purposes in the above-entitled proceeding, will the United States Government or its assigns interfere with the City of Tacoma's right to control the use of the storage area lying below the 1206 foot flood line as condemned in District Court Cause No. 4854?

19. After the condemnation of the easement for road purposes in the above-entitled proceeding, will the United States Government or its assigns interfere with the right of the City of Tacoma to prohibit the use of the property lying below the 1206 foot flood line, as condemned in District Court Cause No. 4854, from commercial, private and recreational purposes?" (R. 74)

None of these interrogatories were answered. Judgment was entered January 14, 1963.

This failure to answer the interrogatories was called to the Court's attention, at the argument on the Appellant's motion for rehearing, in the Appellee's Brief in Support of Judgment.

The District Court Judge William T. Beeks commented as follows:

"THE COURT: I think you are quite well aware of the reason the Court included that in the Judgment, Mr. Brucker, basically that I did not think the Government had been fair with the City of Tacoma in the particular circumstances of this case and the use of the particular property that is involved out there as a watershed. Furthermore, I do not think it prejudices the government as you contend. I am going to deny your motion." (R. 92, 93)

SUMMARY OF ARGUMENT

Appellee's argument in support of Judgment and in answer to Appellant contains essentially similar matter and are combined for brevity. The contention of the United States that the Declaration of Taking was unqualified would, under the circumstances peculiar to this project, make such declaration arbitrary, capricious and fraudulent. Appellee contends that the effect of the Judgment is a determination that the United States has acquired only the estate authorized and reasonably necessary for its project purposes, a private roadway easement which is substantially less than rights for a public highway. Such determination is consistent with the administrative declaration of necessity. Such determination is within the power of the Court to make. The language of the Judgment could have been drafted in various ways to more clearly state this determination, but the clear import of this Judgment when examined with the record of legislative intent and necessity is a determination supporting Appellee's contention that the estate taken was for a private roadway only. There

should be no uncertainty as to this determination in the minds of the interested United States officials, and if there is uncertainty, it is of their own making and this Court should not attempt to resolve such dilemma.

The Federal Government is under an obligation in condemnation proceedings to advise the property owners as to the exact rights which they are taking and also of those rights which are reserved to the property owners after the land has been taken. The Judgment is sufficiently protective of the interests of the City of Tacoma and does not prejudice any rights of the Government or preclude the Appellant from later attempting to secure such greater interests for which it may obtain proper legislative and administrative support and authorization.

ARGUMENT

I

The Government can only take an estate which is reasonably necessary for its purposes and this is what it acquired.

Appellant contends that the Government intended to take an unrestricted roadway easement usable for any normal roadway purpose including travel by the general public, saying "There can be no doubt" about this since "the complaint and declaration of taking clearly describe such an easement."

This contention begs the question.

Appellee has clarified the background of this dispute under the Restatement of the Case. The United States Government had decided upon the construction of a flood control project. Examination of the supporting studies and recommendations of the various interested departments of the Federal Government, in the House of Representatives Document No. 271 (Ex. A) establishes without question the careful consideration that was given to the effect on the City of Tacoma's municipal watershed. It was recognized by all concerned that the project would provide flood control, water storage and fish life benefits, none of which would be inconsistent with the protections required by Tacoma. It was likewise recognized that recreational and related uses were incompatible with watershed management and no provision for such uses was recommended. The United States Government, in short, was not constructing a national park or forestry camps or a scenic highway route when it provided in the flood control project plans for the relocation of the access roads necessary to the construction and operation of its facilities.

Nor is it correct to say, as Appellant has said in its brief that

> "the road is substantially a replacement for those parts of Forest Service Road 212 which will be flooded by the Eagle Gorge Reservoir. Accordingly the road will be used by loggers, truckers, campers and other persons using adjacent Forest Service lands."

Appellant calls the Court's attention in a foot note

that there is pending litigation between King County and the City of Tacoma concerning the County's right to establish public rights in an access road it never properly opened. These are not the same roads but if linked together without limitation of public use could seriously prejudice the Tacoma municipal water supply by increasing the water pollution hazards.

> Appellant correctly states that the road will "probably be used as a means of ingress and egress to the private timber holdings in the area, parts of which have been taken for construction of the dam and reservoir."

This limited use is compatible with the needs of all parties involved in the project land acquisition program. The timber companies have access needs of a limited nature. They are cooperative in the watershed management practices enforced by the City of Tacoma. They likewise have a practical and historical need to keep the access roadways private.

Paragraph 4 of the Declaration of Taking, the Complaint and Amended Complaint (R. 2, 16, 44) specifically state

> "reserving, however, to the landowners, their successors and assigns, all right, title, interest and privileges as may be used and enjoyed without interfering with or abridging the rights hereby acquired by the United States."

It is obvious, therefore, that if access is required into the Tacoma Watershed it must, for the protection of the greater public interest in public health of the municipal water consumers, be limited to such

roadways as are necessary and useful for project, timber and watershed management purposes.

These matters were known to the Congress at the time of passing the enabling legislation authorizing the project. They were known to the Secretary of the Army at the time of his making the Declaration of Taking. He is charged with the administrative responsibility in making such determination to carry out the congressional intent and to take only what is reasonably necessary to accomplish that purpose.

The Declaration of Taking should, therefore, be construed as authorizing only a lesser estate or private roadway. This will provide for and accomplish the needs of the United States as related to *this flood control project.* If the Congress desires to do something else in the area not so related *it* must in turn adopt suitable legislation on which a proper administrative determination can be based. The administrative determination in other words cannot exceed the congressional authorization. Yet this is what Appellants in effect contend by saying that it was the intent to declare unlimited public use by the additional words "and for such other uses as may be authorized by Congress or by Executive Order." (R. 15) Such additional language confers no rights, it is *restrictive* language since it contemplates additional legislative authorization before such private use could be widened.

Appellant would seek to prohibit the District Court inquiry into the administrative determination

saying it is not the duty or function of the Court to review it nor to decide that some other property interest greater or smaller is what the Government needs for the project.

Appellee contends that the District Court has both the power and duty to inquire into the administrative determination of public use and necessity.

Arbitrary, capricious and fraudulent action by an administrative head can always be inquired into and such action set aside by the Court.

In *United States vs. 1,298.15 Acres in Boone County, et al,* 108 F. Supp. 549, a condemnation action for the Bull Shoals Dam and Reservoir flood control project, the District Court for the Western Division of Arkansas stated on Pages 552 and 553:

> "(3, 4) It will be noted that the authority delegated to the Secretary of the Army is 'to acquire in the name of the United States title to all lands, easements, and rights-of-way necessary for any dam and reservoir project * * * for flood control.' The Secretary of the Army's determination of 'necessity' under this grant of authority is subject to judicial review. The administrative determination has great weight, and the court must give due consideration to the action of an administrative agency in selecting a particular tract of land to be taken, but the administrative agency cannot invoke the political power of the Congress to such an extent as to immunize its action against judicial examination in contests between a citizen and the agency.
>
> "(5, 6) Under the facts in this record the question before the court is whether the Secretary of the Army's determination of necessity for the

taking of this tract was arbitrary and capricious. Before a court can reverse an administrative determination that a taking was necessary there must be a showing on the part of the landowner to the effect that the acquiring agency acted arbitrarily, capriciously and without an adequate determining principle. The landowner has not sustained this burden in this case and the court cannot say that the action of the Secretary of the Army in selecting this tract of land was without adequate determining principle and reason or that his action was arbitrary and capricious."

The rule was similarly pronounced in *United States vs. 1,096.84 Acres in Marian County, et al,* 99 F. Supp. 544, involving condemnation for the same project.

In *United States vs. 15.38 Acres of Land in New Castle County, Del., et al,* 61 F. Supp. 937, an action in condemnation to acquire a perpetual easement for a railroad spur track connecting to an air base, the Court said on page 939:

"In these matters, the court should be hesitant in substituting its discretion or belief for that of the Secretary of War who, under Act of Congress, is clothed with authority to make the determinations of necessity and extent. The judge should only intervene where there is a conclusive showing that the Secretary's determination is not made in good faith and hence is arbitrary. . . . In passing, it is suggested that if respondents can show at trial by a factual base, in contradistinction to the conceptualistic arguments that have been made here, that the Secretary of War's decision rests on an absence of good faith, then the whole matter of necessity and extent of es-

tate sought to be acquired will be critically re-examined; otherwise, not."

In *United States vs. 929.70 Acres of Land, In Hughes County, S. D.*, 205 F. Supp. 456, a condemnation action for the South Dakota Big Bend Dam and Reservoir, the Court in upholding the action of the Secretary of the Army said on Page 459:

> "The necessity for the taking, the discretion exercised by the agency validly authorized with such powers, the extent and interests to be taken, and the determination of whether the thing taken is so taken for public use, are not reviewable, in the absence of allegations and proof that such acts were arbitrary, *United States v. Mischke*, 8 Cir., 285 F. 2d 628 (1961); *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 25 L. Ed. 206; S.D.C. 55.0103; *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27, and *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 55 S. Ct. 187, 79 L. Ed. 281."

It was not error, therefore, for the District Court to interpret the congressional authorization and administrative declaration as an intent to take only what is reasonably necessary for the project purposes. This works no injustice on the parties. To have ruled otherwise in the face of the undisputed factual background would have instead countenanced arbitrary, capricious and fraudulent action. It would be arbitrary and capricious for the Secretary of the Army to attempt to replace a private road with a public road in this municipal watershed under circumstances peculiar to this project. It would likewise be actual or constructive fraud for the same official to

declare greater rights than were reasonably necessary for the project under his control to accommodate purposes of *other* governmental agencies which they could not by themselves accomplish.

It is significant that the United States did not answer any of the Appellee's interrogatories which were specifically drafted to inquire into such improper action. Interrogatory No. 14 attached as Exhibit "A" a copy of an agreement between the United States Department of Agriculture and the City dated March 27, 1914, and providing for the protection of the City's water supply and limited use of roads in the Snoqualmie National Forest. The question of consistency of use and purpose was not answered, nor were other similar questions exploring other possible inconsistent purposes.

It is the position of the City of Tacoma that the Federal Government is under an obligation in a condemnation proceedings to advise the property owners as to the exact rights which they are taking and also of those rights which are reserved to the property owners after the land has been taken.

The following quotation from *State vs. Rank*, 293 F. 2d 340 (1961), at page 358, would show that the City's position is well taken:

> "In an exercise of its power of eminent domain, then, the United States must commit itself as to what is taken and as to what remains untaken. That which remains untaken and continues vested in the owner, the officers of the United States must continue to respect.

"In the case at bar, the operation of Friant Dam was not of such a character as to notify these plaintiffs as to the extent of the seizure of their rights. Nor was it accompanied by any sufficiently definite uttered or written notification.

"We conclude that the water rights of these plaintiffs have not been acquired by the United States through exercise of its power of eminent domain."

In *United States vs. 1,278.83 Acres of Land, More or Less, in Mecklenburg County, Va., et al,* 12 F.R.D. 320, a condemnation action, interrogatories by Defendants as to whether the taking of an entire farm was necessary, and if so why, were required to be answered by the Government. The Court said on pages 320 and 321:

"The United States has requested the Court to reconsider its decision requiring answers to the interrogatories. A statement of what issues, aside from valuation, are justiciable in a condemnation case may be helpful.

"(1) Whether or not the purpose for which the property is taken is public is a judicial question. *Rindge v. Los Angeles County,* 262 U.S. 700, 43 S. Ct. 689, 67 L. Ed. 1186. I do not read *U.S. ex rel. Tennessee Val. Authority v. Welch* as altering this doctrine of the Supreme Court. 327 U.S. 546, 552, 556, 557, 66 S. Ct. 715, 90 L. Ed. 843; *U.S. v. Carmack,* 329 U.S. 230, 67 S. Ct. 252, 91 L. Ed. 209. If the purpose is a public use, then the courts cannot inquire into the need, expediency or advisability of undertaking the project—that is, they cannot question the necessity for pursuing the use. *U.S. ex rel. Tennessee Val. Authority v. Welch,* 4 Cir. 150 F. 2d 613,

616, reversed on other grounds 327 U.S. 546, 66 S. Ct. 715, 90 L. Ed. 843.

"(2, 3) Furthermore, whether defined legislatively or administratively, the extent of the take is of judicial cognizance to the extent that it may be questioned as arbitrary or capricious. It follows that a landowner must be heard on whether there is some basis for including his land. Of course, the action of the legislative branch of government alone weighs heavily in favor of the area sought, and the decision of an administrative officer itself likewise demands deference, but neither is so absolute and final as to bar even the effort of the proprietor to demonstrate the choice to be capricious or arbitrary. Rarely will the selection be overturned but that very fact concedes the existence of the right. Improbability of success is not the measure of the right. *U.S. v. State of N.Y.*, 2 Cir., 160 F. 2d 479, 480; *U.S. v. Carmack*, 329 U.S. 230, 67 S. Ct. 252, 91 L. Ed. 209. The immediate implication of the last-cited decision is that while the legislative or administrative ascertainment of what property should be taken is not reviewable 'on its merits' —that is, the sufficiency of the reasons for the decision—it may still be attacked to expose the want of any reason. See, too, *U.S. v. Meyer*, 7 Cir. 113 F. 2d 387, 392, certiorari denied 311 U.S. 706, 61 S. Ct. 174, 85 L. Ed. 459; *U. S. v. Certain Parcels of Land in Town of Denton, etc.*, D.C. Md., 30 F. Supp. 372, 379 opinion by Judge Chesnut; *Carmack v. U.S.*, 8 Cir., 135 F. 2d 196, 200, first opinion, and 8 Cir., 151 F. 2d 881, second opinion, reversed on other grounds 329 U.S. 230, 67 S. Ct. 252, 91 L. Ed. 209, supra; *U. S. v. 4450.72 Acres of Land*, D.C., 27 F. Supp. 167, 175 affirmed 125 F. 2d 636; *U. S. v. 40.75 Acres, D.C.* 76 F. Supp. 239, 249.

"(4) If the condemnee has the right to debate the take in any respect, he has the right to be in-

formed of the facts in that particular. Instantly, the property owner merely asks if his entire farm is necessary, and if so, why. This is not to doubt the wisdom of the project—the necessity for the condemnation—but only to inquire the reason for expropriating all of his farm. Presumably there is a reason. I do not find answer to condemnee's question in either the pertinent Acts of Congress or the pleadings, as the Government suggests. I would not expect to do so; neither would ordinarily so particularize. But if they are there, the Government can the more readily reveal them in replying to the interrogatories. Incidentally, both the petition for condemnation and the declaration of taking aver that the Secretary of the Army chose the lands. As the Government's brief says Congress did so, answer to interrogatory 3 becomes quite relevant. The 4th interrogatory obviously touches the issue of valuation and clearly should be answered.

"I adhere to my original views and direct that all of the interrogatories be answered."

The condemnor, whether representing Federal, State or Municipal authorities, does not have unfettered discretion in these determinations as claimed by Appellant.

If the rule were otherwise, no property rights would be sacred and a chaotic condition of arbitrary and capricious action would prevail.

There is well established court rule and case precedent to the contrary. The determination of the District Court is consistent with these rules and the interpretation of the taking consistent with the rules and the facts. The acreage is not affected. The United States acquired the land interest reasonably necessary

for its project and the Judgment so provides. This can only be what the Government intended and it is not in any way prejudicial to the use of the private roadway for the United States' purposes in this project or the particular private purposes of the other parties to the action including Appellee.

This works no hardship on the United States nor any of its agencies. Any thwarted plans or intentions to make of this road greater uses or more than that of a mere "private roadway" as vaguely referred to by Appellant were inconsistent with the proper congressional intent in the first place. Nor is it any proper argument to say that the Attorney General cannot now write a validating title opinion. He can certainly say that title has vested in the United States in this proceeding to the use of a private roadway just as he must do and probably has done in other similar cases where easements of a limited nature have been so acquired.

The Judgment properly permitted the taking of what was reasonably necessary and protected the City's rights to that which was not.

II

The District Court Judgment if not construed as a final determination that the United States acquired only a private roadway easement, does not prejudice any rights of the Government and properly protects the City of Tacoma under the circumstances. No further action by this Court is required.

Appellant contends that nothing has been decided below, that the District Court somehow dodged the issue and abdicated its authority or duty in favor of another suit. Appellant suggests to the Court that for the purpose of eliminating the need for further controversy a determination of the estate taken be made by this Court.

Appellee does not agree with either proposition. The matter has been determined with finality by the District Court insofar as needs to be determined at this time. This Court surely cannot on the limited assertions of the Appellant, or on a record absent supporting facts, make a redetermination of the question of necessity.

The District Court must have considered that the United States was getting the limited roadway easement it had legislative authority to take, use and was paying for. Had it considered that the contention of the United States was the proper one it obviously would have rejected the contention of the Appellee and entered Judgment accordingly. The burden is on the Government to establish public use and necessity. This it has attempted to dodge throughout the lower court proceedings. It must, however, have been apparent to the District Court from the nature and background of this matter that the United States did not for this flood control project reasonably need to acquire a public road where a private easement or roadway would suffice. Since this was all that was authorized and reasonably necessary to be acquired it was all

that the Court could approve and award damages accordingly.

The Washington State Courts like the Federal Courts are willing to protect the property owner from the desires of a condemning authority who seek to condemn greater land rights than authorized. See *Little vs. King County*, 159 Wash. 326, which contains the following quotation:

> "When a municipality acquires land by eminent domain for road or street purposes, it acquires only a conditional fee title. If the road or street be vacated or abandoned, the land reverts to the abutting owners as their respective interests may then be. The above clause of the judgment should have added thereto the following: 'for a public road or highway.'
>
> "That part of the judgment proposed by appellant to the effect that respondents should be required to give a deed to the roadway cannot be upheld under any theory."

This does not prejudice the United States since with proper congressional enabling legislation and intention the need for greater rights can be considered if and when the necessity for such further taking is ever established.

The damages to which Tacoma would be entitled in the event of the unlimited public access to its watershed, however, would be substantially in excess of those awarded in the Judgment pursuant to the stipulation of parties. (R. 77)

Unlimited public access to the watershed on a

public road developed by the United States and not necessary to this project could literally cost the City millions of dollars by requiring the construction and operation of a filtration treatment plant in lieu of the simple but effective chlorination purification system now used.

The Appellee, therefore, could have been seriously prejudiced by the Court acceptance of the Government's contention. Although Appellee would have favored a more clear determination that the roadway easement acquired was a private roadway, this in any event can be the only consistent interpretation of the effect of the Judgment.

Appellant created its own dilemma but seeks to avoid the consequences of its action.

It becomes increasingly clear that Appellant must have had some other undisclosed purposes in seeking approval of its contention since it is certainly not prejudiced by leaving the necessity for greater rights to be decided if ever at some appropriate time in the future when the then existing factual basis for such need can be fully presented to the Court in a proper manner for consideration.

Appellant, however, seeks to have this Court accept its rejected contention by setting aside that part of the Judgment properly protective of the City's

interest. This proposal again is reflective of the superiority of contention claimed by the Appellant. It declared a need for a roadway easement, it paid for the same and this is what it now has. This is the estate that was necessary for its project purposes and the City is protected in the event the Government attempts to open the road to public travel.

Judgments entered in condemnation proceedings are subject to later interpretation. *Holdridge vs. United States*, 282 F. 2d 302 (1960). Any doubts in the interpretation of a decree in a condemnation action must be resolved against the party who sought to exercise the power of eminent domain. *Clause vs. Garfinkle*, 231 SW 2d 345.

To now accept the Appellant's contention actually involves more than a question of law since there are no facts on record in support of the Government's position. Appellee believes that on the record before the Court the Court can only decide that the contention of the Appellee is correct and the estate acquired by the United States is only a private roadway at best. In fairness to both parties, however, if the Court believes the matter must now be further resolved the case should be remanded for the taking of further evidence.

Had the Government position been made clear at the time of filing the Complaint, the City of Tacoma would have insisted on a formal hearing at which time the United States would have been compelled to prove the necessity for a public road in this municipal wa-

tershed. Appellee believes the United States cannot now properly show a reasonable necessity for a public road and should not be allowed to side-step its responsibility by having this Court eliminate the protective language on the mere assertions of the Appellant previously rejected below.

CONCLUSION

Appellant has only established reasonable necessity for a private roadway, a concept consistent with the legislative background and declaration of taking for this flood control project in the City of Tacoma's municipal watershed and supported by the Judgment of the District Court. This Judgment is sufficiently protective of the parties' present interest in view of the late disclosure of other purposes by the Appellants. If the need arises in the future to establish greater rights, the matter can be properly determined in the light of then existing legislative authorization and determinations of necessity. There is no need or authority for this Court at this time to do anything but affirm the Judgment below.

Respectfully submitted,

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by PAUL J. NOLAN
of Attorneys for Appellee, City of Tacoma.

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL J. NOLAN
Chief Assistant City Attorney